



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 26, 1996

Mr. Richard Boyle
President, Kilgore College Board of Trustees
1100 Broadway
Kilgore, Texas 75662-3299

OR96-0611

Dear Mr. Boyle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 39453.

The Kilgore College Board of Trustees (the "board") received a request for information seeking "any written or audio-taped evaluation made of the Kilgore College President, Dr. J. Frank Thorton, by the college's board of trustees since he became president of the college on Jan. 12, 1993, including Thorton's 1996 evaluation." You claim that the requested information is excepted from required public disclosure pursuant to sections 552.101, 552.102, and 552.111 of the Government Code.

You have submitted a representative sample of the documents responsive to the request for information. You state that the board has no audio-taped evaluations of Dr. Thorton. The documents that you have provided this office for review contain two types of information: form evaluations completed by Kilgore College board members, administration, faculty and students (exhibits A, C, D, F, and G); and letters signed by the board evaluating Dr. Thorton's performance and directing his future actions (exhibits B and E).

You argue that section 552.102 of the Government Code requires the board to withhold all of the documents in their entirety. You claim that the board must appoint and evaluate the president, and thus, the information contained within the evaluations is confidential. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed

to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. Therefore, we will address whether section 552.101 applies to the requested documents.

For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to Gov't Code § 552.101). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.101 also excepts information that is confidential under constitutional or common-law privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed

description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the documents submitted for our consideration and conclude that the information at issue here is not protected by constitutional or common-law privacy.

Section 552.101 also encompasses information protected by other statutes. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert that exhibits B and E and the board's form evaluations of Dr. Thorton (exhibits A, D and G) are deemed confidential under sections 551.074 and 551.075 of the Government Code. Section 551.002 of the Government Code provides that "[e]very regular, special or called meeting of a governmental body shall be open to the public, except as provided by this chapter." Section 551.074 states that

(a) This chapter does not require a governmental body to conduct an open meeting:

(1) to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee.

Section 551.075 also allows a governmental body to receive information from or question an employee in a closed meeting. You state that the board's letters to Dr. Thorton and his board evaluations were discussed, reviewed, and received by the board in "executive session" and that release of the documents through an open records request "would circumvent the privilege for executive session discussions." These provisions of the Open Meetings Act, however, do not make the evaluations or the board's letters confidential under section 552.101. The mere fact that information was discussed in an executive session does not make it confidential under the Open Records Act. Open Records Decision Nos. 605 (1992); 485 (1987).¹ Thus, the requested documents may not be withheld under section 552.101 or 552.102.

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass

¹We note that the request for information in this instance does not seek the minutes or the board's actual deliberations during the executive session. See Gov't Code 551.104 (certified agenda or tape of closed meeting is available for public inspection and copying only under a court order). Rather, the request seeks the evaluations of Dr. Thorton.

internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. While some of the information contained in exhibits B, C, E, and F pertain to the policy functions of board, the remaining information contained in exhibits B, C, E, and F and all of the documents in exhibits A, D, and G relate to a personnel matter, *i.e.*, the evaluations of the president employed by the university; section 552.111 does not except this information from required public disclosure. We have marked those portions of exhibits B, C, E, and F that may be withheld from required public disclosure under section 552.111. The remaining information must be released.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref.: ID# 39453

Enclosures: Marked documents

cc: George Zarazua
Longview News-Journal
P.O. Box 1792
Longview, Texas 76606
(w/o enclosures)

²In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.